LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 29 1976

IN THE

Supreme Court of The United States

OCTOBER TERM, 1975 No. 75-1068

LEA ASSOCIATES, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ROBERT C. LEA, JR.
Counsel for Petitioner

HART CHILDS HEPBURN ROSS & PUTNAM
2000 Two Penn Center Plaza
Philadelphia, PA 19102

PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

IN THE

Supreme Court of The United States

OCTOBER TERM, 1975
No. 75-1068

LEA ASSOCIATES, INC.
Petitioner,

v.

THE UNITED STATES,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your Petitioner Lea Associates, Inc. respectfully prays that this Court reconsider its order of April 5, 1976 denying the Petition for a Writ of Certiorari to review the judgment of the United States Court of Claims in the cause entitled above and that this Court grant said Petition.

As grounds for this Petition, Petitioner respectfully requests the Court's consideration of the following.

1. On March 22, 1976 Petitioner received Respondent's *Memorandum for the United States in Opposition* which was filed in opposition to the *Petition for a Writ of Certiorari.*

2. On April 1, 1976 Petitioner sent to this Court by first class mail Petitioner's Reply Brief Pursuant to Rule 24(4).

3. On April 5, 1976 the clerk of this Court acknowledged receipt of Petitioner's *Reply Brief* and returned

same to Petitioner stating "The enclosed Reply Brief received too late for consideration by this Court. Certiorari denied this date."

4. Petitioner's *Reply Brief* was prepared, printed and mailed in eight working days.

5. Rule 24(4) states no time limit for the filing of a Reply Brief. Petitioner submits that eight working days is unusually prompt for the preparation and submission of a printed brief.

6. The failure to consider Petitioner's Reply Brief is a substantial intervening circumstance within the meaning of Rule 58(2) because Respondent's *Memorandum in Opposition* makes two incorrect statements to this Court the correction of which statements is essential to a determination of this cause.

7. A copy of Petitioner's *Reply Brief* is attached hereto as Appendix 1-4.

8. The Petition for a Writ of Certiorari should be granted and at the very least the Court of Claims should be ordered to hear Petitioner's testimony.

As the matter now stands the Court of Claims has made a determination against Petitioner on grounds that were never alleged against Petitioner in any pleading or in any pretrial memorandum contrary to the Court of Claims' own procedures and contrary to centuries of American and English jurisprudence.

This injustice is supported by two misstatements in Respondents *Memorandum in Opposition.* The most charitable thing that can be said about such misstatements is that current counsel for Respondent (the latest in a succession of five) is unfamiliar with the earlier proceedings in this cause.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, in the Petitioner's *Reply Brief* and in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

ROBERT C. LEA, JR.
Attorney for Petitioner

HART CHILDS HEPBURN ROSS & PUTNAM
2000 Two Penn Center Plaza
Philadelphia, PA 19102

April 19, 1976

AFFIDAVIT UNDER RULE 58(2)

I, Robert C. Lea, Jr., counsel for Petitioner named above, do hereby certify as follows.

(1) The foregoing *Petition for Rehearing* is presented in good faith and not for delay.

(2) The foregoing petition is confined to the intervening circumstance that Petitioner's *Reply Brief* under Rule 24(4) has not been considered by this Court.

(3) Failure to consider Petitioner's *Reply Brief* is substantial because it corrects two serious misstatements in Respondent's Memorandum in Opposition.

ROBERT C. LEA, JR.
Counsel for Petitioner

APPENDIX

IN THE

Supreme Court of The United States

OCTOBER TERM, 1975 NO. 75-1068

LEA ASSOCIATES, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent

PETITIONER'S REPLY BRIEF PURSUANT TO RULE 24 (4)

ROBERT C. LEA, JR.
Counsel for Petitioner

HART CHILDS HEPBURN ROSS & PUTNAM
2000 Two Penn Center Plaza
Philadelphia, PA 19102

BLEED THROUGH

Respondent makes two arguments in its Memorandum which are new in this proceeding.

1. Respondent states, perhaps inadvertently, that petitioner's case in the Court of Claims (No. 433-66) was consolidated with the case of Ken M. Davee (No. 247-66) and that the court below:

> "had the benefit of the evidence offered by both parties (petitioner and Davee) in support of their respective positions, since both parties participated in this consolidated proceeding." (Mem. 3-4).

The two cases were not consolidated (entire record below). The court below did not have the benefit of evidence by petitioner with respect to its determination that petitioner had entered into a contract making an exclusive allocation to the covenant because no such determination was proposed against petitioner in any pleading or pre-trial memorandum.

The trial of the Davee case in Chicago was conducted by counsel for Davee and counsel for respondent assigned to the Davee case. Neither had any interest in nor special knowledge of petitioner's case. It is from that testimony that the proposition is derived that petitioner entered into a contract exclusively assigning $30,000 to the value of the covenant.

For the convenience of the court, the parties and the witnesses, counsel for petitioner then stipulated that the testimony in the Davee case could be used as testimony in petitioner's case (but not the pre-trial memorandum of which he had and has no knowledge).

The intention was to put on the record of this case, without repetition, that the two services were in fact competitive and that the agreements in question were in fact entered into. Petitioner then introduced evidence at the trial in Philadelphia aimed at contraverting the only

pre-trial determination that had been made against petitioner; namely, that petitioner had made a "non-deductible capital expenditure". There is no evidence contrary to petitioner's showing that it acquired in Section 4 of the Sales Agreement a covenant not to compete and nothing else of value. (Pet. App. 37(a)—38(a)).

2. Respondent states that:

> "Contrary to petitioner's assertion (Pet. 9), there is no conflict with *Williams* v. *McGowan,* 152 F2d, 570 (CCA 2), or *Watson* v. *Commissioner,* 354 U.S 544. Those cases hold that a purchase price should be apportioned among the assets and rights acquired, which is exactly what the court below did." (Mem. 4 f.5).

Such allocation in accordance with the leading decisions cited is exactly what the court below failed to do because of its misconception of the law that: "The sale of a going business gives rise to capital gain or loss since it is the sale of a capital asset". (Pet. App. 7a). This is contrary to the rule of the cited cases restated in Rev. Rul. 55-79 (1955-1CB 370), in part, as follows:

> "the sale of a going business . . . does not constitute the sale of a single asset. Such a sale constitutes a sale of the individual assets comprising the business."

As a result of this misconception, now concurred in by the respondent, there is no determination in this case of how petitioner should allocate the lump sum of $357,500 paid by petitioner to Davee for whatever assets were acquired pursuant to the Sales Agreement of May 31, 1962. (Pet. App. 36a-43a).

SUMMARY

Respondent's two new arguments emphasize and do not rebut the fundamental errors in this proceeding. The question presented is the proper allocation of $357,500 paid pursuant to the Sales Agreement of May 31, 1962. The proper allocation of the $30,000 paid by petitioner pursuant to the Sales Agreement of June 1, 1962 was undisputed and not at issue.

The court's error was twofold, one procedural and one substantive. Firstly, the court focused on the proposition that the parties made exclusive allocation by contract, an issue not properly before the court in petitioner's case. Secondly, having found such exclusive allocation, it then committed its basic error of law by concluding that all remaining assets of a going concern which passed under the Sales Agreement were necessarily capital assets.

CONCLUSION

For the reasons set forth above and in the petition, it is respectfully submitted that the writ of certiorari should be granted.

ROBERT C. LEA, JR.,
Attorney for Petitioner

HART CHILDS HEPBURN ROSS & PUTNAM
2000 Two Penn Center Plaza
Philadelphia, PA 19102

March 24, 1976